

United States
Department of the Treasury

Director, Office of Professional Responsibility,
Complainant-Appellee

v.

Complaint No. 2014-04

(b)(3)/26 USC 6103

Respondent-Appellant

Decision on Appeal

Pursuant to the Secretary of the Treasury's designation, General Counsel Order No. 9 (January 19, 2001) and Office of Chief Counsel Notice CC-2018-007 (July 3, 2018), I decide disciplinary appeals to the Secretary of the Treasury filed under 31 C.F.R. Part 10, *Practice Before the Internal Revenue Service* (IRS), commonly referred to as Circular 230 (all references are to Circular 230 as in effect for the periods at issue).¹ This is such an appeal from an Initial Decision and Order (hereinafter Decision) entered in this proceeding by the Honorable Curtis E. Renoe, Administrative Law Judge (the ALJ) on June 15, 2018.

Background

On March 12, 2015, Complainant-Appellee Director of the Office of Professional Responsibility (Complainant) initiated this proceeding by filing a Complaint against Respondent-Appellant (b)(3)/26 USC 6103 (Respondent). Complainant filed the Complaint, however, with the incorrect Administrative Law Judge, who returned it unfiled to Complainant. On April 15, 2015, Complainant filed an identical second Complaint with the correct Administrative Law Judge. Respondent submitted an Answer to the incorrect Administrative Law Judge and served it on Complainant but never filed it with the correct Administrative Law Judge. Complainant filed a Motion for Default Decision, which the Administrative Law Judge granted by Order dated October 15, 2015. On November 25, 2015, Respondent appealed to the Treasury Appellate Authority. Complainant filed a Motion to Dismiss Appeal as Untimely, which Appellate Authority Thomas J. Travers denied by Order dated April 6, 2016. On June 6, 2017, Appellate Authority Thomas J. Travers issued a Decision on Appeal, finding, among other things, that Complainant had timely received a copy of Respondent's Answer to

¹ Portions of Circular 230 were amended on June 12, 2014. See 79 Fed. Reg. 33685 (June 12, 2014); Circular 230 (Rev. 6-2014). These proceedings were instituted after that date and are governed by subpart D and E of Circular 230 as revised. See 31 C.F.R. § 10.91 (2014). Respondent's past conduct is governed by the regulatory provisions in effect at the time the conduct occurred. See *id.*

the first Complaint, that Respondent's Answer to the first Complaint set forth a new address of record for Respondent, and that Complainant did not properly serve the second Complaint, a Notice of Failure to Properly File Answer, or the Motion for Default Decision on Respondent's new address of record. Accordingly, Appellate Authority Thomas J. Travers reversed the Default Decision and remanded the matter for a hearing on the merits.

ALJ's Decision and Complainant's Motion to Dismiss Respondent's Appeal

On December 20, 2017, Complainant filed a Motion for Summary Adjudication in the remanded proceedings, seeking an order that Respondent be disbarred from practice before the IRS. Thereafter, Respondent filed a Response to the Motion, and Complainant filed a Reply. On February 28, 2018, the ALJ issued an Order granting in part and denying in part the Complainant's Motion for Summary Adjudication. The Order granted summary adjudication on Counts 1 through 5 and Count 8 but found that there were material facts in dispute with respect to Counts 6 and 7 and with respect to the appropriate sanction. On March 13, 2018, the ALJ held a hearing on the remaining issues. Respondent did not appear at the hearing. Both parties filed timely post-hearing briefs. On June 15, 2018, the ALJ issued the Decision, sustaining the remaining counts and determining that the appropriate sanction was disbarment.

On June 15, 2018, the Decision was served on Respondent via email and via USPS First Class Mail to two addresses: Respondent's last known address where Complainant served the first Complaint and Respondent's new address of record as set forth in Respondent's Answer to the first Complaint. The Decision informed Respondent that he could appeal to the Secretary of the Treasury within 30 days from the date of service.

Respondent's appeal was due on July 16, 2018.² On July 23, 2018, Respondent filed his Appeal. Respondent did not offer any explanation as to why he filed his appeal late.

On August 23, 2018, Complainant filed a Motion Seeking Leave to File a Motion to Dismiss Respondent's Appeal as Untimely and to Extend Complainant's Deadline for Filing an Opposition to Appeal. The parties to a proceeding under Circular 230 that is on appeal to the Treasury Appellate Authority may only file an appeal brief and a response brief and must file a motion for leave in order to file a motion or other brief or response. Section 10.77(d) of Circular 230. Accordingly, Complainant's motion sought leave to file a motion to dismiss and attached Complainant's Motion to Dismiss Appeal as Untimely as an exhibit. Additionally, Complainant's motion requested an extension of the deadline to file a response brief until 30 days after the Treasury Appellate Authority issues a decision regarding the attached motion to dismiss, given that a decision dismissing the Appeal as untimely would render a response brief moot. Respondent never filed a response to Complainant's motion, nor did Respondent file a motion seeking leave to respond.

² The 30th day after June 15, 2018, was July 15, 2018, a Sunday.

The Appeal in this case was untimely, and therefore the Appeal is dismissed.

Merits of the Disciplinary Proceeding

In a proceeding for sanctions against an IRS practitioner, the ALJ may render a decision on a motion for summary adjudication if the pleadings, depositions, admissions, and any other admissible evidence show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law. Section 10.76(a)(2) of Circular 230. Where there is a genuine issue of material fact, the ALJ will render a decision after holding a hearing. Section 10.76(a)(1) of Circular 230. Before disbaring a practitioner, the ALJ must find that allegations of fact are proven by clear and convincing evidence in the record. Section 10.76(b) of Circular 230. The Appellate Authority reviews the ALJ's findings of fact under a clearly erroneous standard of review and reviews matters of law de novo. Section 10.78 of Circular 230.

The Complaint alleged eight counts of incompetent and disreputable conduct, namely

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103 (Counts 1 through 4, respectively); that Respondent willfully failed to exercise due diligence in determining the correctness of representations made to the Department of Treasury that he was a Certified Public Accountant (CPA) and an Enrolled Agent (EA), when he did not validly hold those statuses (Count 5); that Respondent made false or misleading representations that he was a CPA and an EA with the intent to deceive clients or prospective clients in order to procure employment, or alternatively, that Respondent willfully failed to exercise due diligence in determining the correctness of his representations to clients that he was a CPA and an EA (Count 6); that Respondent willfully prepared tax returns without a valid Preparer Tax Identification Number (PTIN) (Count 7); and that Respondent willfully charged an unconscionable fee in connection with a matter before the IRS (Count 8). The Complaint requested that Respondent be disbarred from practice before the IRS:

Counts 1, 2, 3, and 4

Incompetence and disreputable conduct for which a practitioner may be sanctioned includes "[w]illfully failing to make a Federal tax return in violation of the Federal tax laws." Section 10.51(a)(6) of Circular 230.

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

³ Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue.

(b)(3)/26 USC 6103

(b)(3) / 26 USC 6103

(b)(3)/26 USC 6103

(b)(3)/26 USC 6103

Moreover, the obligation to timely file Federal tax returns is a fundamental aspect of our tax system. See, e.g., Boyle v. United States, 469 U.S. 241, 251 (1985) (“[O]ne does not have to be a tax expert to know that tax returns have fixed filing dates”).

(b)(3) / 26 USC 6103

(b)(3) / 26 USC 6103

(b)(3) / 26 USC 6103

Respondent persists in advancing arguments with respect to

(b)(3)/26 USC 6103

Count 5

A practitioner may be sanctioned for willful violation of the Circular 230 regulations, including section 10.22(a)(2) of Circular 230. Section 10.52(a)(1) of Circular 230. Section 10.22(a)(2) of Circular 230 requires practitioners to exercise due diligence in determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury.

It is undisputed that Respondent filed three Forms 2848, *Power of Attorney and Declaration of Representative*, with the IRS that represented that he was duly qualified to practice as a CPA in California during periods of time when his CPA license had expired. Similarly, it is undisputed that one of the Forms 2848 that Respondent filed with the IRS also represented that he was enrolled as an agent under the requirements of Circular 230 during a period of time when his status as an EA had expired.

Respondent argued before the ALJ that the fact that his CPA license had expired did not preclude him from holding himself out as a CPA. Similarly, Respondent argued before the ALJ that the fact that his EA status had expired did not preclude him from holding himself out as an EA.

The ALJ correctly determined that Respondent's arguments are legally incorrect. Under California law, a person is not duly qualified to practice as a CPA in California, and may not hold him or herself out as such, unless that person has a valid, unexpired California CPA license. See Cal. Bus. & Prof. Code §§ 5050(a) (providing generally that "no person shall engage in the practice of public accountancy in [California] unless the person is the holder of a valid permit to practice public accountancy"), 5051(a) (defining the practice of public accountancy as including, among other things, holding oneself out to the public as qualified to render professional service as a public accountant), 5070.5 (providing rules governing when a CPA permit expires and what a person must do to renew an unexpired permit). Additionally, under Circular 230, a person may not practice before the IRS as an EA unless that person has a valid, unexpired EA card or certificate. Section 10.6(b) and (d) of Circular 230.

Complainant came forward with evidence that Respondent was aware of the Circular 230 regulations, consisting of Respondent's acknowledgement to that effect on Form 2848. And Respondent does not deny that he knew of his obligation to exercise due diligence in determining the correctness of representations he made to the IRS.

Complainant also came forward with clear and convincing evidence that Respondent did not exercise due diligence in determining whether he could hold himself out as a CPA or as an EA during the periods at issue. For instance, during his deposition, Respondent testified that he did not recall looking at anything to determine the status of his CPA license after it had expired and he had not renewed it. Similarly, Respondent testified that he did not recall conducting any research on whether he could hold himself out as an EA after the end of his enrollment cycle when he had not renewed his EA status.

Respondent did not come forward with any evidence that he in fact exercised due diligence. Respondent persists in arguing that he could hold himself out as a CPA and as an EA during periods of time in which his CPA license and EA status were expired. This persistence is not evidence that he has ever exercised due diligence, if anything; it indicates just the opposite. The ALJ had ample reason to find that there was no genuine issue of material fact as to whether Respondent willfully failed to exercise due diligence and that the Complainant was entitled to summary adjudication on Count 5.

Count 6

Incompetence and disreputable conduct for which a practitioner may be sanctioned includes using false or misleading representations with intent to deceive a client or prospective client in order to procure employment. Section 10.51(a)(5) of Section 230.

Alternatively, a practitioner may be sanctioned for willful violation of the Circular 230 regulations, including section 10.22(a)(3) of Circular 230. Section 10.52(a)(1) of Circular 230. Section 10.22(a)(3) of Circular 230 requires practitioners to exercise due diligence in determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the IRS.

In his Order on summary adjudication, the ALJ held that, interpreting the evidence in the light most favorable to Respondent, there were genuine issues of material fact as to whether Respondent had the "intent to deceive" clients or prospective clients "to procure employment." After the hearing, the ALJ held that the record failed to establish this element of Count 6 by clear and convincing evidence. The ALJ held, however, that Complainant proved its alternative theory of Count 6 by clear and convincing evidence, namely that Respondent willfully failed to exercise due diligence in determining the correctness of representations he made to his clients that he was a CPA and an EA during periods of time in which his CPA license and EA status had expired.

It is undisputed that Respondent entered into over 150 written fee agreements with clients while his CPA license and EA status were expired and that the agreements nevertheless represented that he was a CPA and an EA. For the same reasons as described above with respect to Count 5, the record clearly and convincingly establishes that Respondent knew of his obligation to exercise due diligence in determining the correctness of representations he made to clients and that he willfully failed to exercise that due diligence in determining whether he could hold himself out as a CPA or as an EA during the periods at issue. The ALJ had ample reason to find that Complainant proved Count 6 by clear and convincing evidence.

Count 7

Incompetence and disreputable conduct for which a practitioner may be sanctioned includes willfully preparing all or substantially all of, or signing, a tax return or claim for refund when the practitioner does not possess a current or otherwise valid preparer tax identification number or other prescribed identifying number. Section 10.51(a)(17) of Circular 230.

In support of its Motion for Summary Adjudication, Complainant submitted a summary indicating that 56 Federal income tax returns were prepared in 2013 under Respondent's expired PTIN number. In response, Respondent argued that he mostly filed applications for extension of time to file rather than tax returns, that he filed no more than five tax returns during 2013, and that he prepared and filed the applications for extension without compensation. In his Order on summary adjudication, the ALJ held that, interpreting the evidence in the light most favorable to Respondent, there were genuine issues of material fact as to whether Respondent substantially prepared or signed the tax returns at issue and whether he did so for compensation.

At the hearing, Complainant produced copies of IRS records showing that Respondent prepared 56 tax returns or claims for refund under his expired PTIN or his Social

Security Number in 2013. Complainant also produced copies of IRS records relating to two of the taxpayers whose tax return Respondent prepared and of checks issued by those two taxpayers to Respondent, showing that Respondent prepared those two tax returns for compensation under his expired PTIN (or in one case, his expired PTIN but for a typographical error). Respondent argued before the ALJ and argues again on appeal that the compensation he received from these two taxpayers was not for tax return preparation but for other services. Respondent did not come forward with any evidence to support his argument. The ALJ reasonably found that Complainant clearly and convincingly established Count 7 as to the Federal income tax returns that Respondent prepared for these two taxpayers.⁴ The ALJ's factual findings were not clearly erroneous.

Count 8

A practitioner may be sanctioned for willful violation of the Circular 230 regulations, including section 10.27(a) of Circular 230. Section 10.52(a)(1) of Circular 230. Section 10.27(a) of Circular 230 prohibits practitioners from charging an unconscionable fee in connection with any matter before the IRS.

It is undisputed that [REDACTED] (b)(3) / 26 USC 6103 [REDACTED] (b)(3) / 26 USC 6103 [REDACTED] It is undisputed that Respondent prepared amended tax returns for 2007 and 2008 that would have resulted in a total refund for both tax years of \$171,707. And it is undisputed that Respondent charged the taxpayer a total of \$161,500 in fees. Finally, it is undisputed that the taxpayer has only paid Respondent a portion of the fees charged and that the amended tax returns were never filed.

Respondent argued before the ALJ that most of the fees were for "forensic tax records reconstruction" and that the Department of Treasury has no authority to regulate those fees because they do not constitute a "matter before the IRS." The ALJ found that Respondent's admissions and statements in his deposition testimony and in his Response to Complainant's Motion for Summary Adjudication clearly demonstrated that these services were a part of Respondent's preparation of the amended tax returns and therefore that they constituted a "matter before the IRS" as defined in section 10.27(c)(2) of Circular 230. The ALJ found that Respondent did not come forward with any evidence showing that he conducted "forensic tax records reconstruction" for any matter other than the amended tax returns. Consequently, the ALJ held that these services were subject to the prohibition on unconscionable fees.

Respondent argued that because he was never fully paid, he did not actually "charge" an unconscionable fee. The ALJ held that whether Respondent ever actually received the amount he charged is irrelevant to whether he charged the unconscionable fees.

⁴ The Complainant argued before the ALJ that the evidence described above in conjunction with other evidence in the record clearly and convincingly established Count 7 as to all 56 tax returns, but the ALJ found that the record did not clearly and convincingly establish Count 7 as to the other 54 tax returns.

Finally, Respondent compared the amount of the fees he charged to the combined value of the taxpayer's deceased husband's estate and the value of the taxpayer's assets in order to argue that the amount of the fees was not unconscionable. In contrast, the ALJ compared the amount of the fees Respondent charged to the amount of the refunds claimed on the amended tax returns and concluded that it is unconscionable to charge fees encompassing approximately 94 percent of such a significant amount claimed as refunds. The ALJ had ample reason to find that there was no genuine issue of material fact as to whether Respondent willfully charged an unconscionable fee in connection with a matter before the IRS and that the Complainant was entitled to summary adjudication on Count 8.

Appropriate Sanction

The ALJ found that the only appropriate sanction for Respondent's misconduct is disbarment. Because I have found that this Appeal should be dismissed as untimely, I do not have the authority to change the Order of disbarment. In any event, I find Respondent's misconduct to warrant disbarment.

I have considered all of the arguments made by the parties, and to the extent not mentioned herein, I find them to be irrelevant or without merit.

Conclusion

For the reasons stated, Complainant's Motion Seeking Leave to File a Motion to Dismiss Respondent's Appeal as Untimely and to Extend Complainant's Deadline for Filing an Opposition to Appeal is GRANTED in that Complainant's Motion to Dismiss Appeal as Untimely is filed and is DENIED AS MOOT in that no response brief need be filed.

Further, Complainant's Motion to Dismiss Appeal as Untimely is GRANTED. Because Respondent did not timely file his Appeal of the ALJ's Decision, the ALJ's Decision disbaring Respondent from practice before the IRS effective June 15, 2018, became FINAL AGENCY ACTION on July 16, 2018. Respondent (b)(3)/26 USC 6103 is disbarred from practice before the IRS and may petition for reinstatement after 5 years following disbarment as provided by section 10.81 of Circular 230.



Kirk M. Paxson
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of the
Secretary of the Treasury)
October 25, 2019
Seattle, WA

CERTIFICATE OF SERVICE

I hereby certify that the DECISION ON APPEAL dated October 25, 2019 in Complaint No. 2014-04 was sent this day by UPS Next Day Air and by First Class U.S. Mail to the addresses listed below:

Certified mail:

(b)(3)/26 USC 6103
(b)(6)

UPS Next Day Air:

(b)(3)/26 USC 6103

First Class U.S. Mail:

Timothy E. Heinlein

Senior Counsel
Office of Chief Counsel (IRS)
100 First Street, Suite 1800
San Francisco, CA 94105

Elizabeth Kastenber

Acting Director, Office of Professional Responsibility
Internal Revenue Service
1111 Constitution Avenue, NW
SE:OPR, Room 7238/IR
Washington, DC 20224

ALJ Docketing Center

United States Coast Guard
United States Custom House, Room 412
40 South Gay Street
Baltimore, MD 21202

Honorable Curtis E. Renoe

Administrative Law Judge
United States Coast Guard
Coast Guard Island
Building 54A
Alameda, CA 94501

(b)(3) / 26 USC 6103



Kirk M. Paxson
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
Seattle, WA